

**A RHB Bank Bhd v Granstep Development Sdn Bhd (ML
Sepakat Sdn Bhd, third party)**

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-488-11
OF 2018
AHMAD FAIRUZ J
23 SEPTEMBER 2020

C *Contract — Notice — Notice of assignment — Failure to honour obligations under notice of assignment — Plaintiff claimed against defendant for failure to honour obligations under notice of assignment — Whether borrower had absolutely assigned contract proceeds due and payable by defendant to plaintiff — Whether defendant received notice of assignment ('NOA') — Whether defendant obliged to pay contract proceeds due and payable to borrower into borrower's designated account — Whether four progressive payments paid by defendant to borrower were paid in accordance with or in breach of NOA — Whether defendant was relieved from obligation to pay contract proceeds to plaintiff by virtue of claim of liquidated damages against borrower — Whether plaintiff's cause of action to recover contract proceeds should properly be made against defendant or borrower — Whether defendant was liable to pay sum claimed by plaintiff together with interest under all circumstances of matter*

F The bank, RHB Bank Bhd ('the plaintiff') filed a claim against the defendant for failing to honour the obligations under a notice of assignment ('the NOA') issued by the customer of the plaintiff, ML Sepakat Sdn Bhd ('the borrower'). The plaintiff commenced the action against the defendant for recovery of the sum of RM1,306,105.02 as the contract proceeds assigned by the borrower to the plaintiff by the NOA. At the request of the borrower, the plaintiff granted

G the borrowers the facilities as follow: (a) overdraft I facility of RM1.37m ('ODI'); (b) overdraft II facility of RM20m ('ODII'); (c) banker acceptance facility of RM2.5m and bank guarantee facility of RM19m. The ODI and the banker acceptance facilities were granted for the purpose of the borrower's working capital and to finance purchases by the borrower. The ODII and the

H bank guarantee facilities were granted to finance projects which might be awarded by the third parties to the borrower. In August 2017, the borrower informed the plaintiff they were awarded a project by the defendant for site clearance, earthworks and constructions of retaining walls for a proposed housing development in Mukim Ampang, Selangor ('the project'). By a

I supplementary letter of offer, the plaintiff approved the borrower's request on part-financing the project under the ODII facility up to the limit of RM7.95m and to issue a bank guarantee for the sum of RM7.95m in favour of the defendant, subject to the borrower providing a security in the form of legal assignment of the contract proceeds receivable by the defendant under the

project ('the contract proceeds') in favour of the plaintiff. The plaintiff contended that the borrower furnished to the plaintiff a NOA dated 24 October 2017 in which they assigned the contract proceeds to the bank. The plaintiff relied on the defendant's stamp and the signature of DW1, at the portion with the heading 'Acknowledgement by Principal' on the second page of the NOA which on its face showed the defendant's receipt of the NOA. The plaintiff further contended that the NOA contained an irrevocable instruction to the defendant to pay all contract proceeds into the borrower's account. The plaintiff disbursed a total sum of RM3,899,429 to the borrower under ODII facility based on three interim certificates furnished by the borrower. Whilst the defendant challenged the authenticity of the borrower's interim certificates, the defendant did not dispute the borrower's utilisation of the ODII facility or that the plaintiff had disbursed the sum of money to the borrower under the ODII facility. The plaintiff issued a bank guarantee for the sum of RM795,000 in favour of the defendants to secure the performance of the borrower's obligations under the project. Sometime in January 2018, the borrower defaulted in payment of the facilities. The plaintiff made an inquiry with the defendant on the status of payment under the borrower's interim certificates which showed that there was a total sum of RM6,499,051.43 payable by the defendant to the borrower under the project. At the same time, the defendant demanded payment of RM795,000 from the plaintiff under the bank guarantee. In a telephone conversation, DW3, the associate director of the defendant, informed PW2 that the defendant had paid the contract proceeds of approximately RM1.3m directly to the borrower and asked PW2 about the status of payment under the bank guarantee. PW2 was surprised that the defendant paid the contract proceeds directly to the borrower and requested DW3 to provide documentary proof of payment made to the borrower. The plaintiff put the defendant on notice that the payments of the contract proceeds directly to the borrower were breach of the NOA. The plaintiff said that they would exercise their right to set off the bank guarantee sum against the contract proceeds due and owing by the defendant. The defendant disputed the plaintiff's right to set off the bank guarantee sum against the contract proceeds and alleged the plaintiff had breached their obligation to make payment under the bank guarantee. On 3 September 2018, the plaintiff paid the bank guarantee sum to the defendant without prejudice to their rights to claim for the contract proceeds from the defendant. The plaintiff demanded payment of the contract proceeds of RM1,306,105.02 from the defendant but the defendant denied that they were liable. The plaintiff commenced legal action against the borrower due to their default in repayment of the facilities. The plaintiff obtained a judgment in default against the borrower but did not recover any sum from the borrower. The borrower was subsequently wound up on 26 November 2018 at the petition of Sunmaju Sdn Bhd. The issues to be determined were: (i) whether the borrower had absolutely assigned the contract proceeds due and payable by the defendant to the bank; (ii) whether the defendant received the NOA; (iii) whether the defendant was obliged to pay

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- A the contract proceeds due and payable to the borrower into the borrower's designated account'; (iv) whether the four progressive payments paid by the defendant to the borrower totalling RM1,306,105.02 were paid in accordance with or in breach of the NOA; (v) whether the defendant was relieved from the obligation to pay the contract proceeds to the plaintiff by virtue of the claim of liquidated damages against the borrower; and (vi) whether the plaintiff's cause of action to recover the contract proceeds should properly be made against the defendant or the borrower and whether the defendant was liable to pay the sum claimed by the plaintiff together with interest under all circumstances of the matter.

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Held, dismissing plaintiff's claim:

- (1) The position in law with regards to an assignment was never in dispute. The parties did not dwell into the construction of the purported NOA. It was evident as the purported NOA, on its pure construction, was an absolute assignment (see paras 23).
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- (2) Given that the plaintiff wholly relied on the borrower to serve the NOA on the defendant, it was incumbent that the plaintiff to produce evidence in court to show that the NOA was indeed served on the defendant. There was no evidence led by the plaintiff to show that there was service of the NOA to the defendant. No witnesses were called to show how, when or where the NOA was served on the defendant (see para 29).
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- (3) The plaintiff owed the duty to prove the existence of the contentious NOA in particular, that it was served on the defendant as pleaded in the statement of claim. It was the duty of the plaintiff to show that it has a prima facie case against the defendant. If the claim was not perfect, there was no duty on the court to assist the bank. The bank cannot take advantage of the weakness of the defence. The case of the plaintiff which sought to prove the service of the NOA by way of inference was clearly based on a very weak foundation. The inference was not supported by evidence to arrive at a conclusion that on a balance of probabilities, the NOA was in fact served on the defendant. It was the view of the court that the plaintiff failed to prove the service of the NOA and failed to prove the contents of the NOA. The claim that the defendant was bound by the NOA could not stand (see paras 66–69).
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- (4) The court was of the view that the issue of the forged interim certificate was a relevant fact. There was sufficient evidence to show that the borrower had engaged in deceitful practices during the performance of the contract (see paras 70–71).
- (5) It was not disputed that the defendant made four payments totalling of RM1,306,105.02 to the borrower. It was the finding of the court that in making the payments, the defendant was merely performing its part of

the contract with the borrower. It was noted that the payments were all made after the date of the NOA. It could not be denied that it would be counterproductive for the defendant to make defendant to make payments to the borrower if they were aware of the NOA as it would expose them to further obligations to the plaintiff. The proof of payment by the defendant to the borrower clearly showed that the defendant was genuinely unaware of the NOA (see paras 72–74).

- (6) With the finding that the bank failed to prove the service of the NOA to the defendant, it was the view that the remaining issues listed as issued to tried fell (see para 75).

[Bahasa Malaysia summary]

RHB Bank Bhd ('plaintiff') mengajukan tuntutan terhadap defendan kerana tidak menunaikan tanggungjawab berdasarkan notis penyerahan hak ('NOA') yang dikeluarkan oleh pelanggan plaintiff, ML Sepakat Sdn Bhd ('peminjam'). Plaintiff memulakan tindakan terhadap defendan untuk mendapatkan wang berjumlah RM1,306,105.02 kerana hasil kontrak yang diserahkan oleh peminjam kepada plaintiff oleh NOA. Atas permintaan peminjam, plaintiff memberikan kepada peminjam kemudahan pinjaman seperti berikut: (a) kemudahan overdraf I sebanyak RM1,370,000 ('ODI'); (b) kemudahan overdraf II sebanyak RM20 juta ('ODII'); (c) kemudahan penerimaan jurubank sebanyak RM2.5 juta; dan (d) kemudahan jaminan bank sebanyak RM19 juta. Kemudahan ODI dan kemudahan penerimaan jurubank diberikan untuk tujuan modal kerja peminjam dan untuk membiayai pembelian oleh peminjam. Kemudahan ODII dan jaminan bank diberikan untuk membiayai projek yang mungkin diberikan oleh pihak-pihak ketiga kepada peminjam. Pada bulan Ogos 2017, peminjam memaklumkan kepada pihak plaintiff bahawa mereka dianugerahkan projek oleh defendan untuk pembersihan tapak, kerja tanah dan pembinaan tembok penahan untuk cadangan pembangunan perumahan di Mukim Ampang, Selangor ('projek'). Dengan surat tawaran tambahan, plaintiff bersetuju atas permintaan peminjam untuk membiayai sebahagian projek di bawah kemudahan ODII sehingga had RM7.95 juta dan mengisukan jaminan bank dengan jumlah RM7.95 juta untuk pihak defendan, tertakluk kepada peminjam yang memberikan sekuriti dalam bentuk penyerahan hak untuk hasil kontrak yang dapat diterima oleh defendan di bawah projek ('hasil kontrak') kepada plaintiff. Plaintiff berpendapat bahawa peminjam telah memberikan NOA kepada plaintiff pada 24 Oktober 2017 di mana mereka menyerahkan hasil kontrak kepada bank. Plaintiff bergantung pada cop defendan dan tandatangan DW1, di bahagian dengan tajuk 'Pengakuan oleh Prinsipal' di halaman kedua NOA yang di wajahnya menunjukkan penerimaan NOA dari defendan. Plaintiff selanjutnya berhujah bahawa NOA terkandung arahan yang tidak dapat dibatalkan kepada defendan untuk membayar semua hasil kontrak ke dalam akaun peminjam. Plaintiff membayar sejumlah RM3,899,429 kepada peminjam di bawah

- A kemudahan ODII berdasarkan tiga sijil sementara yang diberikan oleh peminjam. Sementara defendan mencabar keaslian sijil sementara peminjam, plaintif tidak mempertikaikan penggunaan kemudahan ODII oleh peminjam atau bahawa plaintif telah membayar sejumlah wang kepada peminjam di bawah kemudahan ODII. Plaintif mengeluarkan jaminan bank berjumlah
- B RM795,000 yang memihak kepada defendan untuk menjamin pelaksanaan tanggungjawab peminjam di bawah projek tersebut. Pada sekitar bulan Januari 2018, peminjam gagal untuk membayar kemudahan-kemudahan tersebut. Plaintif membuat inkuiri dengan defendan mengenai status pembayaran di bawah sijil sementara peminjam yang menunjukkan bahawa terdapat sejumlah
- C RM6,499,051.43 yang dibayar oleh defendan kepada peminjam di bawah projek tersebut. Pada masa yang sama, defendan menuntut pembayaran RM795,000 dari pihak plaintif di bawah jaminan bank. Melalui perbualan telefon, DW3, pengarah bersama defendan, memberitahu PW2 bahawa defendan telah membayar hasil kontrak kira-kira RM1.3 juta terus kepada peminjam dan bertanya kepada PW2 mengenai status pembayaran di bawah jaminan bank. PW2 terkejut kerana plaintif membayar hasil kontrak terus kepada peminjam dan meminta DW3 untuk memberikan bukti dokumentasi pembayaran yang dibuat kepada peminjam. Plaintif mengeluarkan kepada defendan satu notis bahawa pembayaran hasil kontrak terus kepada peminjam
- D adalah melanggar NOA. Plaintif mengatakan bahawa mereka akan menggunakan hak mereka untuk membatalkan jumlah jaminan bank terhadap hasil kontrak yang harus dibayar oleh defendan. Defendan mempertikaikan hak plaintif untuk membatalkan jumlah jaminan bank terhadap hasil kontrak dan menuduh plaintif telah melanggar kewajiban mereka untuk melakukan pembayaran di bawah jaminan bank. Pada 3 September 2018, plaintif membayar sejumlah wang jaminan bank kepada defendan tanpa menjejaskan hak mereka untuk menuntut hasil kontrak dari defendan. Plaintif menuntut pembayaran hasil kontrak berjumlah RM1,306,105.02 dari defendan tetapi defendan menafikan bahawa mereka bertanggungjawab. Plaintif memulakan
- E tindakan undang-undang terhadap peminjam kerana ingkar membayar balik kemudahan tersebut. Plaintif memperoleh penghakiman ingkar terhadap peminjam tetapi tidak apa-apa jumlah wang daripada peminjam. Peminjam kemudiannya digulungkan pada 26 November 2018 atas petisyen Sunmaju Sdn Bhd. Isu-isu yang harus ditentukan adalah: (i) adakah peminjam telah
- F benar-benar memberikan hasil kontrak yang perlu dibayar dan dibayar oleh defendan kepada bank; (ii) adakah defendan menerima NOA; (iii) adakah defendan wajib membayar hasil kontrak yang harus dibayar dan dibayar kepada peminjam ke dalam akaun yang ditetapkan oleh peminjam; (iv) adakah empat pembayaran progresif yang dibayar oleh defendan kepada peminjam
- G berjumlah RM1,306,105,02 telah dibayar selari dengan atau melanggar NOA; (v) adakah defendan dibebaskan dari kewajiban membayar hasil kontrak kepada plaintif berdasarkan tuntutan ganti rugi yang dilikuidasi terhadap peminjam; dan (vi) sama ada kausa tindakan plaintif untuk mendapatkan kembali hasil kontrak harus dibuat dengan tepat terhadap defendan atau
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peminjam dan adakah defendan bertanggungjawab untuk membayar jumlah yang dituntut oleh plaintif bersama dengan faedah dalam semua perkara tersebut.

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Diputuskan, menolak tuntutan plaintif:

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(1) Kedudukan undang-undang dalam hal penyerahan hak tidak pernah dipertikaikan. Pihak-pihak tidak memandangkan akan NOA secara konstruktif. Ini terbukti kerana NOA yang dikatakan, adalah merupakan penyerahan yang secara menyeluruh (lihat perenggan 23).

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(2) Memandangkan plaintif bergantung sepenuhnya pada peminjam untuk menyerahkan NOA pada defendan, adalah menjadi kewajiban plaintif untuk mengemukakan bukti di mahkamah untuk menunjukkan bahawa NOA memang diserahkan kepada defendan. Tidak ada bukti yang diberikan oleh plaintif untuk menunjukkan bahawa ada penyerahan NOA kepada defendan. Tidak ada saksi yang dipanggil untuk menunjukkan bagaimana, bila atau di mana NOA diserahkan kepada defendan (lihat perenggan 29).

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(3) Plaintif mempunyai tanggungjawab untuk membuktikan kewujudan NOA secara khusus, bahawa ia diserahkan kepada defendan sebagaimana yang diminta dalam pernyataan tuntutan. Tugas plaintif adalah untuk menunjukkan bahawa ia mempunyai kes prima facie terhadap defendan. Sekiranya tuntutan itu tidak sempurna, tidak ada kewajiban mahkamah untuk membantu bank. Bank tidak seharusnya memanfaatkan kelemahan pembelaan. Kes plaintif yang ingin membuktikan penyerahan NOA dengan cara inferens adalah asas yang sangat lemah. Inferens itu tidak disokong oleh bukti untuk menyimpulkan bahawa berdasarkan keseimbangan kebarangkalian, NOA sebenarnya telah diserahkan kepada defendan. Mahkamah berpendapat bahawa plaintif gagal membuktikan penyerahan NOA dan gagal membuktikan kandungan NOA tersebut. Tuntutan bahawa defendan terikat oleh NOA tidak dapat dibuktikan (lihat perenggan 66–69).

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(4) Mahkamah berpendapat bahawa penerbitan sijil sementara yang dipalsukan adalah fakta yang relevan. Terdapat bukti yang cukup untuk menunjukkan bahawa peminjam telah melakukan amalan menipu semasa melaksanakan kontrak tersebut (lihat perenggan 70–71).

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(5) Tidak dipertikaikan bahawa defendan melakukan empat pembayaran berjumlah RM1,306,105.02 kepada peminjam. Dari dapatan mahkamah, bahawa ketika melakukan pembayaran, defendan hanya menjalankan sebahagian kontraknya dengan peminjam. Telah diambil maklum bahawa pembayaran semua dibuat setelah tarikh NOA. Tidak dapat dinafikan bahawa akan menjadi tidak produktif bagi defendan untuk membuat defendan melakukan pembayaran kepada peminjam

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- A** jika mereka mengetahui adanya NOA kerana akan membuat mereka kewajiban yang lebih kepada plaintif. Bukti pembayaran oleh defendan kepada peminjam dengan jelas menunjukkan bahawa defendan benar-benar tidak mengetahui adanya NOA (lihat perenggan 72–74).
- B** (6) Dengan dapatan bahawa bank gagal membuktikan penyerahan NOA kepada defendan, maka isu-isu lain yang dinyatakan untuk dibicarakan gagal (lihat perenggan 75).]

Cases referred to

- C** *Arab-Malaysian Merchant Bank Bhd v Sin Hiap Enterprise* [1989] 1 CLJ Rep 307, HC (refd)
Christina Angelina a/p William Bastian & Anor v Newacres Sdn Bhd [1996] 5 MLJ 549, HC (refd)
Crawford and others v Financial Institutions Services Ltd [2005] UKPC 40, PC (refd)
- D** *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33; [1991] 1 CLJ Rep 155, SC (refd)
Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofial bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1992] 2 CLJ Rep 597, SC (refd)
- E** *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alameloo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697, FC (refd)
- F** *Mayban Factoring Bhd v Koperasi Pekerja-Pekerja Jabatan Perdana Menteri Malaysia Bhd* [2001] 4 MLJ 337, CA (refd)
Sabah Development Bank Berhad v Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd) [2020] MLJU 228, FC (refd)
Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel the 'Borcos Takdir' [2012] 5 MLJ 515; [2012] 1 LNS 1116, HC (refd)
- G** *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365, FC (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)

H **Legislation referred to**

Evidence Act 1950 ss 101, 102, 103, 114(g), 145, 155

- I** *CS Mong (Chia Oh Sheng with him) (Lee Hishammuddin Allen & Gledhill) for the plaintiff.*
Syamsul Azhar (The Chambers of Azimul Azami) for the defendant.

Ahmad Fairuz J:

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INTRODUCTION

[1] The plaintiff ('the bank') filed a claim against the defendant for failing to honour the obligations under a notice of assignment ('the NOA') issued by the customer of the bank, ML Sepakat Sdn Bhd ('the borrower'). At the case management stage and before the filing of the defence, on 15 December 2018, the defendant filed a third party notice to include the borrower in the proceedings. The borrower nevertheless failed to enter appearance within the time prescribed by the rules.

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[2] The trial proceeded between the bank and the defendant as the defendant indicated to the court that they were not going to pursue their claim against the borrower. At the conclusion of the trial, this court dismissed the claim of the bank. the bank now appeals against the judgment of this court.

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BACKGROUND

[3] The background of the facts as outlined by the bank are as follows:

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- (a) the bank commenced this action against the defendant for recovery of the sum of RM1,306,105.02, being the contract proceeds assigned by the borrower to the bank by a NOA dated 24 October 2017;
- (b) the trial of this action was held for four days on 6 August 2019, 7 August 2019, 21 October 2019 and 22 October 2019. During the course of the trial, the bank called two witnesses and the defendant called five witnesses to give evidence on their behalf. The witnesses are:
 - (i) PW1 — Sim Tzek Huang, Account Relationship Manager with Commercial West Malaysia 2, Commercial Banking, Group Business and Transaction Banking, RHB Bank Bhd;
 - (ii) PW2 — Wong Yee Ching, Account Manager, Corporate & Commercial Recovery 1, Loan Recovery Department, RHB Bank Bhd of the plaintiff;
 - (iii) DW1 — Siti Nurhamiza bt Mohamad, ex-clerk, Granstep Development Sdn Bhd;
 - (iv) DW2 — Lai Fock Siong, Site Supervisor, Granstep Development Sdn Bhd;
 - (v) DW3 — Pang Yoke Mun, Associate Director, Granstep Development Sdn Bhd;
 - (vi) DW4 — Tan Ah Chai, Director, Granstep Development Sdn Bhd; and

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A (vii) DWS — Ng Keng Bing, engineer and partner, Ng & Ng Consult.

FACILITIES

B [4] At the request of the borrower, the bank granted the following facilities to the borrower:

- (a) overdraft I facility of RM1.37m ('ODI');
- (b) overdraft II (against claims) facility of RM20m ('ODII');
- C (c) banker's acceptance facility of RM2.5m; and
- (d) bank guarantee facility of RM19m.
(collectively, 'facilities').

D [5] The ODI and banker's acceptance facilities were granted for the purpose of the borrower's working capital and to finance purchases by the borrower. The ODII and bank guarantee facilities were granted to finance projects which may be awarded by third parties to the borrower.

E [6] In or around August 2017, the borrower informed the bank they were awarded a project by the defendant for site clearance, earthworks and construction of retaining walls for a proposed housing development in Mukim Ampang, Selangor ('the project'). The borrower requested the bank to part-finance the project under the ODII facility and to issue a bank guarantee in favour of the defendant to secure their obligations under the project.

G [7] By a supplementary letter of offer dated 10 October 2017, the bank approved the borrower's request on part-financing the project under the ODII facility up to the limit of RM7.95m and to issue a bank guarantee for the sum of RM795,000 in favour of the defendant, subject to, inter alia, the borrower providing a security in the form of a legal assignment of the contract proceeds receivable from the defendant under the project ('the contract proceeds') in favour of the bank.

H ASSIGNMENT OF CONTRACT PROCEEDS

I [8] The bank contended that on 3 November 2017, the borrower furnished to the bank a NOA dated 24 October 2017 in which they assigned the contract proceeds to the bank. The NOA reads:

ML SEPAKAT SDN BHD
(325476 V)
15, Jalan Kuningan Puan, 5-01, Taman Kuning Puan, 83100 Johor Bahru, Johor Darul Ta'zim
Tel: 07-3514677/3516259 / 3516462 / 3516163 Fax: 07 3516164
E-mail: info@mlsepakat.com | contact@mlsepakat.com | marketing@mlsepakat.com
GST RUK NCC: R0012551308

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FORM 2222
R/L 2014-2015

Date: 24/07/2017

GRANDSTAR DEVELOPMENT SDN BHD
Suite 14-16, 16th Floor Wisma Zebra
No.1, Jalan Tesik, Pemasaran 2
Bukit Timah
Cheras 56000, Kuala Lumpur, Malaysia

Attention: The Manager

Dear Sir/Madam,

NOTICE OF ASSIGNMENT OF PROCEEDS

PROPOSED SITE CLEARANCE, EARTHWORKS AND RETAINING WALLS FOR CADANGAN PEMBANGUNAN 3 SKIM PERUMAHAN BERPAKAR (SKIM 1, SKIM 2 AND SKIM 4) SERTA 1 SKIM PERUMAHAN BERTANJAH (SKIM 3) DI ATAS LOT 1287 (PT 30517 HS (D) 34833), MUKIM AMPANG, DAERAH HULU LANGAT, SELANGOR DARUL EHSAN, CONTRACT NO: RM15,000,000.00

1. We hereby give you notice that, we have assigned absolutely all proceeds inclusive of GST and all rights interest and benefit to the extent under the following Contract (the Contract) to Bank Berhad (5171-46) ("the Bank")

PROPOSED SITE CLEARANCE, EARTHWORKS AND RETAINING WALLS FOR CADANGAN PEMBANGUNAN 3 SKIM PERUMAHAN BERPAKAR (SKIM 1, SKIM 2 AND SKIM 4) SERTA 1 SKIM PERUMAHAN BERTANJAH (SKIM 3) DI ATAS LOT 1287 (PT 30517 HS (D) 34833), MUKIM AMPANG, DAERAH HULU LANGAT, SELANGOR DARUL EHSAN, ("Notice")

2. You are hereby instructed to pay all proceeds inclusive of GST under the above Contract(s) interest in cash or by way of cheque direct in our name directly to the Bank into the following account:

Account No.: 2-01370-0001000000
Branch Address: 0610 Bank Bhd.
Suite 4-1, Level 4, Malayan Pangsari
No.2, Jalan Kuning, Taman Pangsari
80400 Johor Bahru, Johor

3. Payment of all proceeds into the above Account shall be an effective discharge by you of your obligation to pay the proceeds to us under the above Contract.

4. This Notice and instructions herein are irrevocable and shall not be revoked, modified or varied without the Bank's consent in writing being first obtained.

5. Please acknowledge receipt and return the duplicate of this letter to us duly acknowledged.

Yours faithfully
[Signature]

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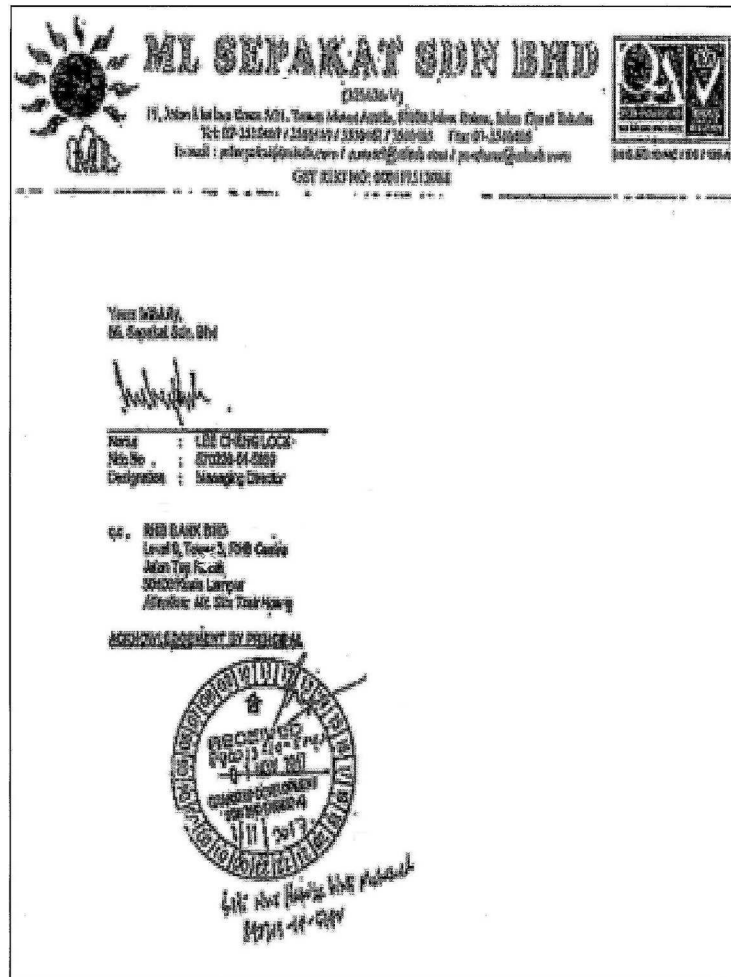
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[9] The bank relied on the defendant's stamp and the signature of DW1, at the portion with the heading 'Acknowledgement by Principal' on the second page of the NOA which on its face shows the defendant's receipt of the NOA on 1 November 2017. The bank contended that the NOA also contains an irrevocable instruction to the defendant to pay all contract proceeds into the borrower's account bearing No 2-01370-5001000-3 ('the borrower's designated account') maintained with the bank's branch at Suite 1-2, Level 1, Menara Pelangi, No 2, Jalan Kuning, Taman Pelangi, 80400 Johor Bahru, Johor.

[10] The bank disbursed a total sum of RM3,899,429 to the borrower under the ODII facility between 9 November 2017 and 5 January 2018 based on

three interim certificates furnished by the borrower ('the borrower's interim certificates'). Whilst the defendant challenged the authenticity of the borrower's interim certificates at trial, they did not dispute the borrower's utilisation of the ODII facility or that the bank had disbursed the sum of RM3,899,429 to the borrower under the ODII facility.

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[11] On 23 November 2017, the bank issued a bank guarantee dated 23 November 2017 ('the bank guarantee') for the sum of RM795,000 in favour of the defendant to secure performance of the borrower's obligations under the project.

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[12] Sometime in January 2018, the borrower defaulted in repayment of the facilities. By a letter dated 4 June 2018 to the defendant, the bank made an inquiry with the defendant on the status of payment under the borrower's interim certificates which showed there is a total sum of RM6,499,051.43 payable by the defendant to the borrower under the project.

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[13] At the same time, the defendant, by a letter dated 4 June 2018, demanded payment of RM795,000 from the bank under the bank guarantee.

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[14] On 5 June 2018, PW2, an account manager of the bank, received a telephone call from DW3, the associate director of the defendant. In the telephone conversation, DW3 informed PW2 that the defendant has paid the contract proceeds of approximately RM1.3m directly to the borrower and asked PW2 about the status of payment under the bank guarantee. PW2 was surprised that the defendant has paid the contract proceeds directly to the borrower and requested DW3 to provide documentary proof of the payments made to the borrower.

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[15] On 6 June 2018, PW2 and her supervisor, Ms Esther Lai Chwen Huey met DW3 at the bank's head office at Jalan Tun Razak, Kuala Lumpur. At the meeting:

- (a) DW3 handed to PW2 a letter dated 6 June 2018 from the defendant together with the documents showing the payments made by the defendant to the borrower. The defendant's letter dated 6 June 2018 was in reply to the bank's letter dated 4 June 2018;
- (b) DW3 said the defendant has made four progress payments amounting to RM1,306,105.02 directly to the borrower pursuant to four certificates of payment issued by Messrs Ng & Ng Consult. DW3 also furnished the four certificates of payment dated 12 December 2017, 17 January 2018, 14 February 2018 and 20 March 2018 ('the certificates of payment');

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- A** (c) DW3 also claimed the borrower has stopped works under the project and requested the bank to release payment to the defendant under the bank guarantee; and
- B** (d) in response, PW2 told DW3 that the bank will go through the documents furnished by her and revert on payment of the bank guarantee sum and the bank's claim under the NOA.

DEMAND FOR PAYMENT OF CONTRACT PROCEEDS

- C** [16] By letters dated 20 June 2018 and 21 June 2018, the bank put the defendant on notice that the payments of the contract proceeds directly to the borrower were in breach of the NOA. The bank also said they will exercise their right to set off the bank guarantee sum against the contract proceeds due and owing by the defendant.
- D** [17] By a letter dated 6 August 2018 from the defendant's solicitors to the bank, the defendant disputed the bank's right to set off the bank guarantee sum against the contract proceeds and alleged the bank has breached their obligation to make payment under the bank guarantee.
- E** [18] On 3 September 2018, the bank paid the bank guarantee sum to the defendant without prejudice to their rights to claim for the contract proceeds from the defendant.
- F** [19] By the bank's solicitors' letter dated 4 September 2018 to the defendant's solicitors, the bank demanded payment of the contract proceeds of RM1,306,105.02 from the defendant. The defendant denied that they were liable.
- G** [20] On 11 October 2018, the bank commenced legal action against the borrower due to their default in repayment of the facilities. the bank obtained a judgment in default against the borrower on 7 November 2018 but did not recover any sum from the borrower. The borrower was subsequently wound up on 26 November 2018 at the petition of Sunmaju Sdn Bhd.
- H**
- I** [21] On 5 November 2018, the bank commenced this action against the defendant for recovery of the contract proceeds in the sum of RM1,306,105.02 as certified in the certificates of payment and paid by the defendant to the borrower, albeit wrongfully.

ISSUES

- [22] The issues to be tried in this action as agreed by the parties are as follows:

- (a) whether the borrower had absolutely assigned the contract proceeds due and payable by the defendant to the bank; A
- (b) whether the defendant received the NOA;
- (c) whether the defendant was obliged to pay the contract proceeds due and payable to the borrower into the borrower's designated account; B
- (d) whether the four progressive payments paid by the defendant to the borrower totaling RM1,306,105.02 were paid in accordance with or in breach of the NOA;
- (e) whether the defendant is relieved from their obligation to make payment of the contract proceeds to the bank by virtue of their claim for liquidated damages against the borrower under the contract dated 11 January 2008 between the borrower and defendant ('PAM contract'); C
- (f) whether the bank's cause of action to recover the contract proceeds should properly be made against the defendant or the borrower; and D
- (g) whether the defendant is liable to pay the sum of RM1,306,105.02 claimed by the bank together with interest under all the circumstances of this matter. E

ANALYSIS

The assignment

[23] The position in law with regards to an assignment was never in dispute. Parties did not dwell into the construction of the purported NOA. This was evident as the purported NOA, on its pure construction, was an absolute assignment. In the recent decision of the Federal Court, *Sabah Development Bank Berhad v Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd)* [2020] MLJU 228, Nallini FCJ restated the established principles of what an assignment constitutes. Her Ladyship held as follows:

[65] The next issue considered was whether the contract of assignment did indeed absolutely assign such a chose in action or merely secured it.

[66] *Whether or not an assignment is absolute for the purposes of the statutory regime is ultimately an issue of construction (see Mercantile Bank of London Ltd v Evans [1899] 2 QB 613).*

[67] The case of *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149; [1989] 2 CLJ 101 (SC) is authority for the proposition that the use of the words 'absolutely assigns' demonstrates that the instrument was intended by the parties to be an absolute assignment and not one by way of charge only.

[68] the bank here holds an absolute assignment, consistent with the use of the words 'assigns absolutely' as employed in section 3.1 of the contract for the

- A** assignment of proceeds (see also *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd*; *United General Insurance Co Sdn Bhd v Progress Credit Sdn Bhd* [1988] 2 MLJ 297; [1988] 1 LNS 8; *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62; [1988] 1 CLJ 164; *Phileoallied Bank (M) Bhd v Bupinder Singh all Avatar Singh & Anor* [2002] 2 MLJ 513; [2002] 2 AMR 2081; [2002] 2 CLJ 621 (FC)).
- B**

[69] *It is apparent from the use of the words 'assigns absolutely' in the clauses specified in the contract for the assignment of proceeds in the instant case, that the assignment of the chose in action, ie the right to the proceeds paid into the project accounts, is an absolute assignment and not by way of charge only.* (Emphasis added.)

- C**
- [24] Going by the wordings of the purported NOA, the assignment by the borrower of the contract proceeds to the bank was an absolute assignment. No issues were raised by either party of the construction of the purported NOA. This is consistent with the authorities found in *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365; *Christina Angelina al/p William Bastian & Anor v Newacres Sdn Bhd* [1996] 5 MLJ 549; *Mayban Factoring Bhd v Koperasi Pekerja-Pekerja Jabatan Perdana Menteri Malaysia Bhd* [2001] 4 MLJ 337 and *Arab-Malaysian Merchant Bank Bhd v Sin Hiap Enterprise* [1989] 1 CLJ Rep 307.
- D**
- E**

Whether the defendant received the NOA

- F** [25] The case of the bank rests squarely on the requirement of the defendant performing the obligations stated in the NOA. However, before such an obligation can arise, it is pertinent to determine if the defendant was aware of the NOA and its contents. Foremost is whether the NOA was served on the defendant and that the defendant had notice of the said NOA.

- G** [26] PW1 explained that as part of the contractual terms of ODII, the borrower was to assign the contract proceeds of the site clearing works to the bank. According to PW1, the borrower showed proof of the assignment by forwarding a copy of the NOA to the bank. The NOA was in fact handed to the bank by the borrower's Financial Controller Heng Chiou Yang to PW1 who then made copies of the said NOA.
- H**

Service of the NOA: Whether the defendant received the NOA

- I** [27] With regards to the service of the NOA on the defendant, PW1 explained that 'As far as the bank is concerned, the NOA was properly served on Granstep as they acknowledged receipt of it'. On whether the bank had any responsibility to inform the defendant of the assignment, PW1 said 'No requirement of the bank to inform or provide any explanation to Granstep on the NOA'.

[28] While this could be the standard process that the bank abides by, it would not be an issue if the service of the NOA was not disputed and the party who served the NOA came to court to testify. In the current case, the service was disputed and the party who served the said NOA was not called to testify.

A

[29] Given that the bank wholly relied on the borrower to serve the NOA on the defendant, it is therefore incumbent that the bank to produce evidence in court to show that the NOA was indeed served on the defendant. This in turn will leave the defendant with an inescapable obligation to abide by the NOA. Unfortunately, there was no evidence led by the bank to show that there was service of the NOA to the defendant. No witnesses were called to show how, when or where the NOA was served on the defendant.

B

C

[30] Instead, the bank sought to demonstrate the service of the NOA by way of inference. The bank argued that the court can safely accept the argument that the NOA was in fact served on the defendant primarily due to the conduct of the defendant after being confronted with the NOA.

D

[31] It was highlighted that the defendant after being contacted by the bank, did not dispute receiving the said NOA. It was argued that the defendant did not raise such an issue during the course of correspondence with the bank between 6 June 2018 up to 24 October 2018 when the correspondence stopped and the bank commenced legal action against the defendant. This according to the bank tantamount to an acceptance of the fact that they received the NOA (reliance was placed on *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155).

E

F

[32] The bank went on to highlight what it termed as the 'express admission' that the defendant had in fact received the NOA. This was in relation to the reply by the defendant to the bank in a letter dated 6 June 2018. The defendant was quoted to have replied the following to the bank.

G

We refer to the above matter and our letter dated 04.06.2018 and your letter dated 04.06.2018 refers.

ASSIGNMENT OF PAYMENT TO RHB

H

Clause 30. 1 of the Contract mentioned that:

After the issuance of the Certificate of Practical Completion, Interim Certificates shall be issued as and further amounts are ascertained by the Architect and Quantity Surveyor as payable to the Contractor by the Employer.

I

The Contract is silent on the issue of assignment of payment by us the Principal to RHB Bank. *The only document mentioning this assignment is the letter from the Contractor to us dated 24.10.2017 but the bank guarantee dated 23.11.2017 is also silent on this assignment.*

- A Please be informed that as at to date, we have made 4 Progress Payments directly to the Contractor, amounting to RM1,306,105.02 ... At this juncture, we believe that assignment has no legal effect to the relationship between us and the Contractor as all the payments made pursuant to the methods mentioned in the Contract. Furthermore, the Contractor's letter dated 24.10.2017 was sent to us without our approval towards the Contractor's request. Thus, the terms of the Contract is applicable in this matter. (Emphasis added.)
- B

[33] As such, the bank argued that the defendant's witnesses were not credible when they claimed that they did not receive the said NOA.

- C
- [34] The bank also argued that the defendant was inconsistent in their stand when putting across their version of events relating to the NOA. It was argued that DW2 who was at the site office was inconsistent in her explanation of how the NOA came into being. It was pointed out that DW1 in her witness statement explained that when the representative of the borrower delivered the purported NOA at the site office, it was a letter that she understood to be a letter for a 'loan application by the borrower'. However, during cross-examination, DW1 instead said that she didn't know what the letter was as she could not understand English very well. Similarly, it was pointed to the court that DW2 who was also at the site office did not read the NOA or the 'purported letter'.
- D
- E

- F [35] The police reports by DW1 which contents differ between one and the other was also attacked by the bank. It was submitted by counsel for the bank that the differing contents were clear signs that the reports were unreliable and an afterthought. It was contended that DW1 was coached by DW3 to ensure that the defendant was absolved from any knowledge of the NOA.

- G [36] The bank therefore argued due to the above factors, the logical conclusion was that the NOA was served on the defendant. As such, the defendant was obliged to make payment of the contract proceeds to the bank. In essence, the bank argued that the defence raised by the defendant with regards to the non-receipt of the NOA was an afterthought.

- H [37] The defence was very much based on a factual assertion. Thus, it is crucial for this court to evaluate the responses of the defendant's witnesses. This invariably, depended on the credibility and reliability of the witnesses.

- I *Assessment of credibility*

[38] DW1 was a former clerk of the defendant who was stationed at the site office. She was cross-examined at length on how she placed the defendant's rubber stamp on the NOA. She explained that the representative of the

borrower, 'David Lai' had asked her for her identification card number and full name after she had signed and stamped the said NOA on the second page of the document.

A

[39] She was candid in her answers which included being blamed for wrongly signing and stamping on the purported NOA. There was genuine fear on her part that she had committed a wrong. This was the reason why two police reports were lodged by her.

B

[40] This court also accepted the explanation that DW1 did not make a copy of the letter as David Lai was in a hurry. In totality, the cross-examination did not rattle the witness and it is the assessment of this court that her credibility was intact. Even when the evidence of DW2 was considered, it did not show any divergence or inconsistency.

C

[41] DW2, the clerk of works ('COW') explained that David Lai came in on 1 November 2011 hurriedly ('tergesa-gesa') to the site office seeking for the defendant's rubber stamp to be placed on a letter purportedly to be bank guarantee. He then directed DW1 to stamp the letter as requested.

D

[42] He was firm in his answer that he did not read the letter but was told by David Lai that it related to the borrower's bank guarantee. He also explained that as the document related to a bank guarantee, the head quarters of the defendant would be responsible for all such documentation. Therefore, he did not pay much attention to the letter.

E

F

[43] DW2 explained under intense cross-examination that he was used to receiving documents at the site office but they usually relate to construction documents. He could not identify the document as he merely directed DW1 to sign and stamp it.

G

[44] Similar to the assessment of this court of DW1's credibility, DW2 was also unsuspecting when he entertained David Lai's request to acknowledge the letter.

H

[45] This court finds that DW1 and DW2 were narrating events which they themselves genuinely did not suspect anything amiss when the representative of the borrower appeared at the site office with the purported NOA.

I

[46] DW3, the associate director of the defendant explained in court that a day or two after they attempted to call on the performance bond issued by the bank, they were contacted by the bank and were asked to pay a sum of RM6,499,051.43. DW3 explained that this came as a surprise because they

- A were not aware of any NOA dated 24 October 2017, the basis for which the bank was claiming the said sum. DW3 then met up with PW2 and explained the defendant's position while furnishing the bank with all the relevant documentation including proof of payment to the borrower. The payments made to the borrower are as follows:
- B (a) two progress payments in the sums of RM342,601.62 and RM145,523.06 were paid into the borrower's Operating Account No 20137050002116 ('the borrower's operating account') with the bank on 11 January 2018 and 12 February 2018 respectively;
- C (b) one progress payment in the sum of RM348,645.83 was paid into the borrower's account with CIMB Bank Bhd on 14 March 2018 ('the borrower's CIMB account'); and
- D (c) one progress payment in the sum of RM469,334.51 was paid into the borrower's account with Hong Leong Bank Bhd on 16 April 2018 ('the borrower's HLBB Account').

- E [47] DW3 was cross-examined on the contents of the letter dated 6 August 2018 which the defendant sent to the bank explaining their position and disclaiming any responsibility to the amount claimed by the bank. DW3 explained that the letter was drafted by the defendant without the benefit of legal advice. Despite the letter suggesting the defendant had received the NOA, DW3 maintained that the letter was not in any manner acknowledging receipt of the NOA. This was also echoed by DW4, a director of the defendant and
- F signatory of the 6 August 2018 letter.

- G [48] It is the finding of this court that both DW3 and DW4 were witnesses of truth. In the scenario that they were in, there was urgency for them to reply to the demand of RM6,499,051.43 made by the bank vide a letter dated 4 June 2018. This culminated in their reply letter to the bank dated 6 August 2018. It was almost an immediate response by the defendant to protect their position. It is the view of this court that if the defendant wanted to dispute the receipt of the NOA, they could have clearly worded so instead of responding in the manner they did. It was an honest response.

- H [49] DW5 confirmed that the Interim Certificate No 1 dated 5 September 2017, Interim Certificate No 2 dated 5 October 2017 and Interim Certificate No 3 dated 6 November 2017 (collectively the 'forged interim certificates') were all not issued by him or his firm. He was confronted with the forged
- I certificates only after he was asked to verify the said certificates at the defendant's office on 1 August 2019. He then lodged a police report which was marked as D8.

- [50] It is the finding of this court that DW5 was a witness that came to court

as a neutral party informing that his firm's interim certificates were forged and a police report was lodged by him. It was a significant finding which tilted in favour of the defendant's case as it provided support to the argument by the defendant that they were a victim of deceit practice by the borrower.

A

[51] This court finds the explanation and demeanour of the defendant's witnesses consistent with their assertion that they were unaware of the NOA and its contents.

B

[52] On the credibility of the bank's witnesses, this court makes the following observations. PW1 who was a key witness for the bank explained the relationship between the bank and the borrower. He was however very careful in his responses to questions under cross-examination. It was not unexpected that his demeanour appeared defensive. The very fact that he was not sure whether a police report was lodged by the bank is one instance of the non-committal stand taken by the said witness under cross-examination. However, on the same issue PW2 affirmatively testified that PW1 had lodged a report.

C

D

[53] This court finds PW2, the bank officer in charge of the recovery work against the borrower, was honest in his explanation with regards to the reason why the initial demand made by the bank to the defendant amounted to RM6,499,051.43. This was the exact amount submitted by the borrower to the bank via the interim certificates which DW5 found to be forged.

E

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[54] It was only after DW3 met with PW2 and handed over the documents showing proof of payments to the borrowers that the bank decided to revise its claim to RM1,306,105.02, the amount eventually demanded by the bank under this current suit.

G

[55] It is the finding of this court that the bank acknowledged the deceit orchestrated by the borrower. This is consistent with their action of lodging a police report as told to this court by PW2. This was why they agreed to revise their claim against the defendant. If the bank was fully convinced of the drawdown sums claimed under the forged certificates (which was based on the interim certificates amounting to RM6,499,051.43), the bank would not have relented and accepted the defendant's explanation.

H

[56] The explanation by PW2 clearly showed that the bank realised that what was served by the borrower to them and what was issued to the defendant were different.

I

A [57] It was the explanation of PW2 himself that the bank decided to file an action against the borrower for recovery of the amounts drawn down under the ODII contract after they defaulted on the repayment.

B [58] Discrepancies there will always be in the testimony of witnesses but to render their evidence worthless is not an automatic consequence of such discrepancy unless impeachment proceedings under ss 145 and 155 of the Evidence Act 1950 is successfully undertaken.

C [59] On an overall assessment of the credibility of the witnesses, it is the view of this court that there is no reason to reject the evidence of the defendant's witnesses. In the assessment of this court, they were truthful witnesses.

Invocation of s 114 para (g) of the Evidence Act 1950

D [60] This court evaluated the argument of the bank. What is patently clear is the failure by the bank to adduce any direct evidence that the said NOA was served on the defendant. This was the cardinal flaw of the bank's case.

E [61] The mystery of whether the said NOA was served would have been unravelled if the said representative of the borrower was called to explain how the service was carried out. There was no explanation by the bank as to why they did not call any of the representatives of the borrower. After all, the bank had all the contact numbers of the borrower's representatives including their personal email addresses.

F [62] This was evident when PW1 the relationship manager of the bank admitted having been in contact with one of the representatives using the representative's personal email. PW1 also stated that the borrower was a long standing client of over 20 years of the bank. However, nothing was explained by the bank's witnesses as to whether the borrower's representative could be located or contacted for purposes of attending court. The abject failure of the bank to explain the reasons for not calling the representatives left this court guessing as to the reason why such an approach was taken by the bank in presenting its case.

G [63] The failure to procure the representative of the borrower who purportedly served the NOA on the defendant undeniably created a gap in the narrative of the bank's case. This court is compelled to invoke adverse inference against the bank under s 114 para (g) of the Evidence Act 1950 ('s 114(g)'). The law journals are replete with cases that discusses the application of this inference. Reference is made to *Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel the 'Borcos Takdir'* [2012] 5 MLJ 515; [2012] 1 LNS 1116, where it was stated by Nallini

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Pathmanathan J (as she then was):

A

... The person best placed to explain fully the events of the day would have been the master but the defendant failed to call the master as witness. Stating that he was uncooperative. Given the importance of this witness' evidence, the defendant's failure to subpoena him led this court to conclude that the master's evidence if produced, would affect the defendant adversely. This was a fit and proper case for this court to draw an adverse inference under s 114(g) against the defendant ...

B

(See also *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33; [1991] 1 CLJ Rep 155, *Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofial bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1992] 2 CLJ Rep 597 and *Crawford and others v Financial Institutions Services Ltd* [2005] UKPC 40).

C

Bank's duty to prove the claim

D

[64] The failure of the bank to call the important witnesses meant that the bank could not disprove the version of events raised by the defendant. It is not the duty of the defendant to support the case of the bank in any manner. It was a misguided argument by the bank to argue that adverse inference instead should have been applied against the defendant for failure to produce the letter received by DW1 at the site office. There is simply no duty on the defendant to do so. The duty lies squarely on the bank.

E

[65] Consistent with established principles, the burden of proving a case lies with the party who asserts the facts it seeks to establish. Hence when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. This is provided under ss 101, 102 and 103 of the Evidence Act 1950.

F

[66] In this current case, the bank owes the duty to prove the existence of the contentious NOA in particular, that it was served on the defendant as pleaded in the statement of claim.

G

[67] Therefore, it is the duty of the bank to show it has a prima facie case against the defendant. If the claim is not perfect, there is no duty on the court to assist the bank. The bank cannot take advantage of the weakness of the defence. The bank's case must stand or fall upon the evidence adduced by the bank (see *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alameloo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697).

H

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[68] The case of the bank which seeks to prove the service of the NOA by way of inference was clearly based on a very weak foundation. The inference is

A not supported by evidence that allows this court to arrive at a conclusion that on a balance of probabilities, the NOA was in fact served on the defendant.

[69] It is the view of this court that the bank failed to prove the service of the NOA. It has also failed to prove that the contents of the NOA. The claim that
B the defendant was bound by the NOA cannot stand.

The forged interim certificates

[70] This court is of the view that the issue of the forged interim certificates
C issued by the architect, Ng & Ng Consult is a relevant fact. The defendant called DW5, the architect who was involved in the project where the borrower was carrying out work for the defendant. He was referred to the impugned Interim certificates marked as P3(b), P3(c) and P4(a). DW5 explained in court
D that he found the interim certificates to be forged. He denied issuing the certificates. To prove his point, DW5 affirmed a statutory declaration which was marked as D7. In the statutory declaration, he explained that his firm did not issue the interim certificates P3(b), P3(c) and P4(a). A police report marked as DB was also lodged by DW5 complaining of the suspected forgery.

[71] It is the finding of this court that there is sufficient evidence to show that
E the borrower had engaged in deceitful practices during the performance of the contract. The conduct of the borrower lends credence to the complaint by the defendant that they were a victim of a plot engineered by the borrower which
F resulted in the predicament that they are in today. The manner in which the NOA was said to have been served on them and the actual contents of the NOA then became an issue which must be considered by this court as something that supports the version of events pleaded by the defendant.

G *The defendant made payment of RM1,306,105.02*

[72] It was not disputed that the defendant made four payments totalling of
H RM1,306,105.02 to the borrower. This was confirmed by DW3. The said payments were based on the interim certificates issued by Ng & Ng Consult.

[73] It is the finding of this court that in making the payments, the
I defendant was merely performing its part of the contract with the borrower. It is to be noted that the payments were all made after the date of the NOA. It cannot be denied that it would be counter productive for the defendant to make payments to the borrower if they were aware of the NOA dated 24 October 2017 as it would expose them to further obligations to the bank.

[74] The proof of payment by the defendant to the borrower clearly showed that the defendant was genuinely unaware of the NOA.

Other issues

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[75] With the finding that the bank failed to prove the service of the NOA to the defendant, it is the view of this court that the remaining issues listed as issues to be tried falls. This include the following:

B

(a) whether the defendant was obliged to pay the contract proceeds due and payable to the borrower into the borrower's designated account;

(b) whether the four progressive payments paid by the defendant to the borrower totalling RM1,306,105.02 were paid in accordance with or in breach of the NOA;

C

(c) whether the defendant is relieved from their obligation to make payment of the contract proceeds to the bank by virtue of their claim for liquidated damages against the borrower under the contract dated 11 January 2008 between the borrower and defendant ('PAM contract');

D

(d) whether the bank's cause of action to recover the contract proceeds should properly be made against the defendant or the borrower; and

(e) whether the defendant is liable to pay the sum of RM1,306,105.02 claimed by the bank together with interest under all the circumstances of this matter.

E

CONCLUSION

F

[76] This court is unable to arrive at a finding that the bank has proven its case that the defendant was served with the NOA. The unrebutted contention of the defendant that there was deceit practised by the borrower further reinforces this finding. This court is of the firm view that the defendant was not aware of the NOA and therefore cannot be bound by the NOA.

G

[77] This court is of the view that the bank too was a victim of the deceit employed by the borrower. This is evident from the forged interim certificates issued by the borrower to the bank during the course of the drawdown of ODII. The higher value stated in the forged interim certificates enable the borrower to receive a higher drawdown of the facility.

H

[78] The failure of the bank to prove on a balance of probability the service on the defendant was fatal. It left this court feeling unsafe to arrive at any conclusion that there was good service of the NOA on the defendant.

I

A [79] The act of the defendant in making payments directly to the borrower on dates after the date of the purported NOA is clear proof of the defendant's knowledge that it was unbeknown to them of the defendant's obligation to the bank.

B [80] In the foregoing, it is the view of this court that the bank failed to prove its claim. The suit is therefore dismissed with costs.

Plaintiff's claim dismissed.

C Reported by Mohd Kamarul Anwar

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